HAWAI'I CIVIL RIGHTS COMMISSION

STATE OF HAWAI'I

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In the Matter of	)	Rule Relief Docket No. 06-001
	)	
PETITION TO AMEND HAW. ADMIN. R. §§ 12-46-109(c) and (d) and 12-46-175(d),	)	
	)	
HAWAI'I EMPLOYERS COUNCIL,	)	
	)	
Petitioner.	)	
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EXECUTIVE DIRECTOR'S MEMORANDUM IN THE MATTER OF HAWAI'I EMPLOYERS COUNCIL'S PETITION FOR RULE RELIEF AS TO HAW. ADMIN. R. §§ 12-46-109(c) AND 12-46-175(d)

In accordance with the Order of the Hawai'i Civil Rights Commission dated March 23, 2006, the Executive Director submits his memorandum regarding disposition of the HAWAI'I EMPLOYERS COUNCIL'S PETITION FOR RULE RELIEF AS TO HAW. ADMIN. R. §§ 12-46-109(c) AND 12-46-175(d), pursuant to § 12-46-85, Hawai'i Administrative Rules.

William D. Hoshijo
Executive Director

4/4/06
Date

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I. INTRODUCTION

Petitioner seeks amendment of Hawai'i Administrative Rules (hereinafter "HAR") §§ 12-46-109(c), 12-46-109(d), and 12-46-175(d) "to comport with the affirmative defense recognized by the United States Supreme Court in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998), as well as the United States Equal Employment Opportunity Commission's (hereinafter "EEOC's") current rules governing unlawful harassment by supervisors."[1] The Executive Director recommends that the Commission deny any further consideration of the Hawai'i Employer Council's PETITION TO AMEND HAW. ADMIN. R. §§ 12-46-109(c) and (d) and 12-46-175(d)(hereinafter "HEC Petition").[2]

In support of its petition, the Hawai'i Employer's Council (hereafter "Petitioner") points to EEOC's regulations, amended after the U.S. Supreme Court's decisions in Faragher/Ellerth, and makes the following unsupported assertions:

> HCRC regulations on supervisor liability were copied from the EEOC guidelines because the HCRC obviously assumed that an employer's vicarious liability for supervisor harassment under Hawai'i law was the same as an employer's vicarious liability for supervisor harassment under Title VII. If the HCRC's assumption is correct, and the scope of vicarious liability under Hawai'i law is coextensive with Title VII, then the Hawai'i regulations addressing supervisor liability for harassment should be amended to track the current EEOC regulations, rather than the prior regulations which the EEOC has recognized as defective.

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[1] HEC Petition at 1-2. In support of its petition, Petitioner points to differences between Hawai'i and federal administrative regulations. Compare HAR §§ 12-46-109(c) & 12-46-109(d), with 29 C.F.R. § 1604.11 (as amended, 1999); compare HAR § 12-46-175(d), with 29 C.F.R. § 1606.8 (as amended, 1999).

[2] In accordance with HAR § 12-46-82, the Commission may deny a petition for rule relief where the petition: (1) fails to substantially conform with the requirements of HAR § 12-46-81; (2) discloses no sufficient reasons for justifying the institution of public rulemaking procedures; or (3) is frivolous. HAR § 12-46-82(b).

HEC Petition at 9-10. Upon this basis, Petitioner argues that Hawai'i Civil Rights Commission (hereinafter "HCRC" or "Commission") must amend Hawai'i law regarding the affirmative defenses available to employer liability for harassment.[3]

The Executive Director recommends that the HEC Petition be denied for the following reasons. First, Petitioner fails to present sufficient reasons justifying initiation of public rulemaking and may be denied for that reason alone.[4] Second, Hawai'i civil rights laws are more expansive than federal law. Third, HAR §§ 12-46-109(c), 12-46-109(d) and 12-46-175(d) are well-established Hawai'i law. Fourth, the proposed amendments to Hawai'i law would impose employer liability for supervisor harassment under a standard *less* protective than even the federal laws Petitioner claims the Commission should follow. Finally, the proposed amendments to Hawai'i law would diminish the recognized remedial purposes of Hawai'i's anti-discrimination laws.

II. EXECUTIVE DIRECTOR'S STATEMENT

A. The Protections and Scope of Hawai'i Law Is More Expansive and *Not* the Same as Federal Law.

Stronger enforcement of Hawai'i's civil rights laws is premised, in part, upon a Hawai'i Constitutional provision that is absent from the federal constitution and the constitutions of many other states. Article I, section 5 of the Hawai'i Constitution provides:

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[3] Id.

[4] HAR § 12-46-82(b)(2). In accordance with H.A.R. § 12-46-82, the Commission may deny a petition for rule relief as it deems necessary, but has provided "the commission may deny any petition which: (1) fails to substantially conform with the requirements of section 12-46-81; (2) discloses no sufficient reasons for justifying the institution of public rulemaking procedures; or (3) is frivolous." Id.

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor *be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof* because of race, religion, sex or ancestry.

HAW. CONST. art. I, § 5 (emphasis added). Delegates to the 1950 Constitutional Convention adopted this provision based, in part, on strong civil rights concerns that stemmed from their personal experiences with *de jure* and *de facto* discrimination under Hawai'i's segregated, plantation past. See generally, Lawrence H. Fuchs, HAWAII PONO: A SOCIAL HISTORY (1961).

As a result, the State of Hawai'i demonstrated an early commitment to eliminating employment discrimination by adopting its anti-discrimination provisions before the enactment of analogous federal provisions. Compare 1963 Haw. Sess. L., Act 180 (codified at Hawai'i Revised Statutes (hereinafter "HRS") Chapter 378), with The Civil Rights Act of 1964, 78 Stat. 243, § 701 et seq. (codified at 42 U.S.C. §§ 2000a et seq.). In 1989, the Hawai'i legislature later established the HCRC to "more effectively enforce the State's discrimination laws" and "to provide an accessible forum to anyone who has suffered from discrimination." Stand. Comm. Rep. No. 372, in 1989 House Journal at 984. In doing so, the legislature expressed its intent "... to establish a strong and viable commission with sufficient ... enforcement powers to effectuate the State's commitment to preserving the civil rights of all individuals." Id. The Commission promulgated HAR §§ 12-46-109(c), 12-46-109(d) and 12-46-175(d), effective December 31, 1990, under the authority provided by the state legislature and consistent with the civil rights provision of the Hawai'i Constitution.

Changing Hawai'i's regulations to comport with EEOC's regulations presumes that Hawai'i's civil rights laws are *the same as* federal civil rights laws. They are not. The scope and coverage provided by Hawai'i civil rights law are more expansive in numerous respects than those provided by federal law.[5]

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[5] See, Ross v. Stouffer Hotel Co. (Hawaii) Ltd., 76 Hawai'i 454, 879 P.2d 1037 (1994)(rejecting a more restrictive federal standard for determining when the statute of limitations begins for filing initial administrative complaints of discrimination and adopting a more expansive definition of marital status and "being married", incorporating the identity and occupation of a person's spouse); Furukawa v. Honolulu

Further, Petitioner asserts inaccurately that Hawai'i's courts have "traditionally looked for guidance to federal law under Title VII when interpreting Hawai'i discrimination law."[6] Rather, the Hawai'i Supreme Court has repeatedly recognized that the analysis of federal discrimination law may often *not* be appropriate for use by Hawai'i. For example, in discussing the role of federal civil rights cases in interpreting Hawai'i law, in Furukawa v. Honolulu Zoological Society, 85 Hawai'i 7, 936 P.2d 643 (1997), the Hawai'i Supreme Court noted that "a federal court's interpretation of Title VII is *not binding* on this court's interpretation of civil rights laws adopted by the Hawai'i legislature" but that in the absence of relevant Hawai'i case law, Hawai'i courts *may* "look to [federal court] decisions for guidance[.]" Id. at 13, 936 P.2d at 649 (emphasis added). In adopting several analytical principles for Hawai'i discrimination laws that differ from that provided by federal law, the Supreme Court noted that "federal employment discrimination authority is not necessarily persuasive, particularly where a state's statutory provision differs in relevant detail." Id.

Similarly, in Nelson v. University of Hawai'i, 97 Hawai'i 376, 38 P.3d 95 (2001), the Hawai'i Supreme Court stated that where federal discrimination case law is inconsistent with Hawai'i law,

> this court need not resolve any inconsistencies in the federal case law. *Nor would it be wise for us to import such confusing or inconsistent language into our case law.* Moreover, although "the federal courts' interpretation of Title VII is useful in construing Hawaii employment discrimination law[,]" Sam Teague, Ltd. v. Hawai'i Civil Rights Comm'n, 89 Hawai'i 269, 281, 971 P.2d 1104, 1116 (1999), it is not controlling."

97 Hawai'i at 390, 38 P.3d at 109 (emphasis added).[7]

Zoological Soc'y, 85 Hawai'i 7, 936 P.2d 643 (1998)(rejecting a federal court's interpretation that employees must be similarly situated in "all respects" and instead required that they be similar in "all relevant respects" because the more restrictive federal standard would not protect employees of smaller businesses); Nelson v. University of Hawai'i, 97 Hawai'i 376, 38 P.3d 95 (2001)(adopting a distinct and different framework for analyzing hostile environment sexual harassment claims under Hawai'i law).

[6] HEC Petition at 10.

[7] Petitioner implies that the Commission's adoption of the Faragher/Ellerth defense will lend consistency in Hawai'i's harassment law. This is not true. The federal court's application of the Faragher/Ellerth defense has resulted in a voluminous, confusing, and often contradictory body of law,

In discussing the standard for analyzing harassment cases under Hawai'i law, the Nelson Court noted the differences between EEOC's regulations defining sexual harassment under federal law (29 C.F.R. § 1604.11) and HAR § 12-46-109 defining sexual harassment under Hawai'i law. While acknowledging seemingly contrary federal case precedent, the Hawai'i Supreme Court announced a *distinct* and different framework for analyzing sexual harassment claims under Hawai'i law. Nelson, 97 Hawai'i at 387-390, 38 P.3d at 106-09.[8] See also, Arquero v. Hilton Hawaiian Village LLC, 104 Hawai'i 423, 431, 91 P.3d 505, 513 (2004)(citing Nelson, supra, for the proposition that "*in contrast to federal courts*, ... we separate the severity and pervasiveness of conduct from the effect that conduct had on the employee's work environment")(emphasis added).[9] Thus, federal court interpretations of civil rights laws clearly are "not controlling" in this jurisdiction.

B. Hawai'i Standards of Employer Liability Are Settled Law.

More than fifteen years ago the Commission promulgated HAR §§ 12-46-109(c), 12-46-109(d) and 12-46-175(d) establishing employer liability for acts of harassment by "agents and supervisory employees ... regardless of whether the specific acts complained of were authorized or even forbidden, and regardless of whether the employer or other

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which, rather than eliminating workplace harassment, has simply resulted in employers becoming educated about the technical steps that must be taken to avoid liability for workplace harassment. The affirmative defense has also created a contradictory, overly formalistic, and unnecessarily punitive body of law relating to the "reasonableness" of victims of supervisory sexual harassment. See, for a critique of federal courts' application of the Faragher/Ellerth defense, Kerri Lynn Bauchner, From Pig in a Parlor to Boar in the Boardroom: Why Ellerth Isn't Working and How Other Ideological Models Can Help Reconceptualize the Law of Sexual Harassment, 8 Colum. J. Gender & L. 303 (1999); Joanna L. Grossman, The First Bite Is Free: Employer Liability for Sexual Harassment, 61 U. Pitt. L. Rev. 671 (2000); David Sherwyn, et. al., Don't Train Your Employees and Cancel your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges, 69 Fordham L. Rev. 1265 (2001); B. Glenn George, If You're Not Part of the Solution, You're Part of the Problem: Employer Liability for Sexual Harassment, 13 Yale J.L. & Feminism 133 (2001); Joanna L. Grossman, The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law, Vol. 26 Harvard Journal of Law & Gender (2003); Anne Lawton, Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense, 13 Colum. J. Gender & L. 197, 198 (2004).

[8] The Commission may wish to note that the Nelson case was decided in 2001, well after the US Supreme Court's 1998 Faragher/Ellerth decisions, which Petitioner avers that the Commission *must* rely upon.

[9] Nelson, 97 Hawai'i at 390, 38 P.3d at 109; Arquero, 104 Hawai'i at 429-30, 91 P.3d at 511-12.

covered entity knew or should have known of their occurrence" (HAR § 12-46-109(c)), and stating that an "employee's failure to give notice [of co-worker harassment] may not be an affirmative defense" (HAR § 12-46-109(d)).

Unlike the prior regulations of the EEOC, to which Congress gave only the power to issue procedural rules, administrative rules adopted by the Commission are promulgated pursuant to a statutory grant of authority.[10] The Hawai'i Supreme Court has expressly deferred to the administrative rules promulgated by the Commission.[11] Thus, while "substantive rules adopted by the EEOC ... are not promulgated pursuant to a statutory grant of authority [and are therefore] ... interpretive rather than legislative in nature," the administrative rules adopted by the Commission are legislative regulations that are binding on courts.[12] Hence, the regulations Petitioner challenges are *not* the same as EEOC's former guidelines as the Petitioner erroneously assumes.[13] HEC Petition at 9.

Fifteen years of settled Hawai'i law cannot simply be brushed aside through rulemaking as requested by the Petitioner. Over the past fifteen-plus years, the Commission has created a body of precedential case law repeatedly finding that Hawai'i employers are liable for acts of harassment by supervisory employees and agents. Dolores Santos v. Hawaiian Flower Exports, Inc and Masami "Sparky" Niimi, Docket No. 92-001 E-SH, Final Decision and Order (HCRC Jan. 25, 1993)(supervisory agent and employer jointly and severally liable for sexual harassment pursuant to HAR § 12-46-

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10 See, HRS § 368-3(9) and HRS Chapter 91. "State regulations, promulgated pursuant to properly delegated authority, have the force and effect of law." KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3 (3d. ed.1994)(interpretive regulation is persuasive, but not binding on courts, whereas a legislative regulation is binding on court); KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT, § 5.03, p. 126 (3d. ed.1972)(with regulations promulgated pursuant to statutory grant of authority "[a] court may no more substitute its judgment as to the content of a legislative rule than it may substitute its judgment as to the content of a statute").

11 See, Nelson v. University of Hawai'i, 97 Hawai'i 376, 391, 38 P.3d 95, 110 (2001)("the HCRC's interpretation of the law ... should be given due deference."); Sam Teague, Ltd. v. Hawai'i Civil Rights Comm'n, 89 Hawai'i 269, 276 n.2, 971 P.2d 1104, 1111 n.2 (1999)("we give persuasive weight ... to the Commission's administrative rules").

12 Id.

13 Further, unlike the situation faced by the EEOC when the U.S. Supreme Court stated new law in the Faragher/Ellerth decisions, the Commission is *not* faced with any change in law or interpretation that would require a change in its rules.

108(c)); Linda Louise Gould v. Dr. Robert Simich, formerly dba Dr. Robert Simich and Associates, also formerly dba Kailua Family and Urgent Care; and Dr. Harold Steinberg, Docket No. 95-012-E-SH, Final Decision and Order (HCRC Oct. 29, 1996)(employer and supervisor jointly and severally liable for sexual harassment by supervisor though employer had no knowledge of the harassment); Diane Davis, deceased, by her husband, Steve Davis v. Volcano Island Farms, Inc. dba Hawaiian Hemp Co. and Dwight Kondo; Docket No. 94-003-E-R , Final Decision and Order (HCRC Feb. 8, 1995)(company owner liable for acts of racial harassment).[14]

Even more significantly, this body of Commission case law has been repeatedly and uniformly affirmed by Hawai'i Courts,[15] including cases in which the Hawai'i Supreme Court has repeatedly acknowledged the current regulations' reflection of Hawai'i's law regarding employer liability for supervisory harassment.[16]

First, in Steinberg v. Hoshijo, 88 Hawai'i 10, 960 P.2d 1218 (1998), which involved supervisory sexual harassment, the Hawai'i Supreme Court affirmed the Commission's finding of liability where the employer had *no* knowledge of the harassment and where the employee admitted she had not complained about the harassment because she feared retaliation and did not know if the acts were illegal harassment. Id. at 13. The Court noted that the HCRC Hearings Examiner's recommendation of liability for the employer was premised on liability under a "theory of respondeat superior pursuant to HAR § 12-46-109(c)" and found no error of law by the Commission. Id. at 14–15, 18-19.

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[14] See also, Ross v. Stouffer Hotel Co. (Hawaii) Ltd., 76 Hawai'i 454, 471 n.5, 879 P.2d 1037, 1054 n.5 (1994) (Klein, J., and Moon, C.J., concurring and dissenting)("favoring adherence to principles of stare decisis include 'considerations of certainty and the equal treatment of similarly situated litigants.'")

[15] See, Masami "Sparky" Niimi vs. Hawai'i Civil Rights Commission, Civil No. 93-88 (Haw. 1st Cir. Aug. 31, 1994)(affirming agency decision, agent personally liable for harassment, employer and agent joint and several liability for award of punitive and compensatory damages supported by record); Volcano Island Farms, Inc. dba The Hawaiian Hemp Co and Dwight Kondo v. Hawaii Civil Rights Commission, Civil No. 95-105 (Haw. 1st Cir. Jan. 4, 1996)(affirming agency decision, finding employer liability and doubling relief to employee).

[16] See, Steinberg v. Hoshijo, 88 Hawai'i 10, 960 P.2d 1218 (1998); Gonzalves v. Nissan Motor Corp., 100 Hawai'i 149, 58 P.3d 1196 (2002); Arquero v. Hilton Hawaiian Village LLC, 104 Hawai'i 423, 91 P.3d 505 (2004).

Second, in Gonzalves v. Nissan Motor Corp., 100 Hawai'i 149, 58 P.3d 1196 (2002), the Hawai'i Supreme Court had another opportunity to consider the standards established by the Commission in HAR §12-46-108(c). Id. at 181, 58 P.3d at 1228 (Acoba, J., concurring in part and dissenting in part). As noted by Petitioner, Justice Acoba explicitly cited to the Commission's amicus brief which argued that "within the context of supervisor harassment, absolute liability on the employer is imposed[.]" Id. Again, in Gonzalves, the Court found no error in the Commission's statement of law with respect to employer liability for supervisory sexual harassment.

Finally, in stating the proper standards for analysis of a co-worker sexual harassment claim under Hawai'i law, Arquero v. Hilton Hawaiian Village LLC, 104 Hawai'i 423, 91 P.3d 505 (2004), fully quotes HAR § 12-46-109(c) for the proposition of employer liability for supervisory sexual harassment and, again, neither states nor implies that the rule is erroneous or is not Hawai'i law.[17] Id. at 428, 91 P.3d at 510.

In the more than fifteen years since the promulgation of HAR §§ 12-46-109(c), 12-46-109(d) and 12-46-175(d), the Hawai'i Legislature has stated *no* disagreement and taken *no* action to change the standards for employer liability for supervisor harassment. The Hawai'i Legislature has amended HRS Chapter 378, Part 1, on several occasions over the previous fifteen years, yet not *once* has the Legislature acted to overturn or alter the Commission's rules and interpretations regarding employer liability for supervisory harassment.[18] When the Legislature fails to act in response to long-standing statutory interpretation, that "interpretation ... must be considered to have the tacit approval of the legislature and the effect of legislation." Kahale v. City and County of Honolulu, 104

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[17] Arquero at 428 n.7. See also, Camara v. Agsalud, 67 Haw. 212, 685 P.2d 794 (1984)(Hawai'i courts are free to reverse an agency's decision if the decision is affected by an error of law; to be granted deference by a reviewing court, agency's decision must be consistent with legislative purpose); Keanini v. Akiba, 93 Hawai'i 75, 996 P.2d 280 (2000)(same); HRS § 91-14(g)(4).

[18] 1991 Haw. Sess. L., Act 2 (1991); 1992 Haw. Sess. L., Act 33 & Act 275 (1992); 1994 Haw. Sess. L., Act 88 (1994); 1997 Haw. Sess. L., Act 365 (1997); 1998 Haw. Sess. L., Act 175 (1998); 1999 Haw. Sess. L., Act 172 (1999); 2002 Haw. Sess. L., Act 217 (2002); 2003 Haw. Sess. L., Act 95 (2003); 2004 Haw. Sess. L., Act 79 (2004); 2005 Haw. Sess. L., Act 35 (2005).

Hawai'i 341, 90 P.3d 233 (2004)(citing Ross v. Stouffer Hotel Co. (Hawaii) Ltd., 76 Hawai'i 454, 458, 879 P.2d 1037, 1041 (1994)).[19]

C. The HEC Petition Seeks Amendments Imposing A *Lower* Standard of Employer Liability Than Is Currently Imposed Under Federal Law (i.e., Under Faragher/Ellerth).

In Burlington Industries v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998), the U.S. Supreme Court crafted a two-prong affirmative defense to strict liability for employers, where the alleged supervisory harassment does not involve a "tangible employment action."[20] To avoid liability for a supervisor's harassment of an employee, the Faragher/Ellerth affirmative defense requires the employer to prove both that (1) it exercised reasonable care to prevent and correct workplace harassment, *and* (2) the employee unreasonably failed to take advantage of preventative and correct mechanisms established by the employer. Under Faragher/Ellerth the only instance in which an employer is held automatically liable for supervisor harassment is when the harassment results in a "tangible employment action."[21]

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[19] See also, N.L.R.B. v. Bell Aerospace Co. Div. of Textron, 416 U.S. 267 (1974)(court should accord great weight to the longstanding interpretation of statute by an agency charged with its administration -- particularly where Congress has re-enacted the statute without pertinent change; in such circumstances, congressional failure to revise or repeal the agency's interpretation is "persuasive evidence that the interpretation is the one intended by Congress").

[20] In Faragher/Ellerth, the U.S. Supreme Court created two classes of supervisory harassment claims, one class involves tangible employment action, wherein the employer is strictly liable for supervisor's harassment (also sometimes described as *quid pro quo* harassment), and the second class are those cases in which no tangible employment action is taken (also sometimes referred to as hostile environment harassment). *See*, Ann Lawton, *The Emperor's New Clothes: How the Academy Deals with Sexual Harassment*, 11 YALE J.L. & FEMINISM, 74, 100-01 (1999)(hereinafter, "Lawton, *The Emperor's New Clothes*")(noting that far more women experience hostile environment harassment than *quid pro quo* harassment").

[21] The U.S. Supreme Court has stated that this term refers to "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington, 524 U.S. at 761. Because "harassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability" (See, EEOC Enforcement Guidance, at 9 (as amended, 1999), the Commission's denial of the Petition will consequently result in, among other things, the Commission and Hawai'i courts not being faced with the importation of the confusing and contradictory federal case law relating to "adverse employment actions."

Petitioner's proposed amendments go far beyond the U.S. Supreme Court's holdings in Faragher/Ellerth. Petitioner proposes the deletion of subsection (c) of §12-46-109 in its entirety, seemingly without regard to the type of harassment or whether there is any "tangible employment action." Petitioner further proposes to amend subsection (d) relating to co-employee sexual harassment by limiting the employer's liability to situations in which the employer knew or should have known of the harassment. A similar change is requested for HAR § 12-46-175(d). In other words, Petitioner appears to be proposing that the Commission convert employers' liability to the simple notice-based negligence standard, which has been rejected by both the U.S. Supreme Court in Faragher/Ellerth, and by the post-Faragher/Ellerth EEOC in its Enforcement Guidance.

Under federal law, prior to Faragher/Ellerth, and notwithstanding EEOC's regulations, an employer's liability for supervisory sexual harassment was predicated on the nature of the claim of sexual harassment involved. In cases where the sexual harassment involved a claim of *quid pro quo* sexual harassment, courts generally held employers strictly liable. In cases involving hostile environment sexual harassment by a supervisor, liability was imposed on an employer through the use and application of agency principles. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).[22]

In Faragher/Ellerth, the U.S. Supreme Court eschewed the *quid pro quo*/hostile environment sexual harassment dichotomy. Instead, it held that employers are strictly liable regardless of the type of sexual harassment involved, if the harassment resulted in a "tangible employment action" because (as noted by Petitioner)
". . . such acts can only be performed by supervisors, and the supervisor is aided in committing such harassment by virtue of his/her agency relationship with the employer."[23] Under federal law, for all harassment cases that do not result in a "tangible employment action," the employer may raise the Faragher/Ellerth affirmative defense to liability.

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22 See also, SEXUAL HARASSMENT IN EMPLOYMENT LAW, Chapter 6 (Lindemann and Kadue, eds., BNA 1992) ("Harassment By Supervisors").

23 HEC Petition at 7 (citing to Ellerth, 524 U.S. at 761-762)(emphasis added).

However, even under the liability standards articulated in Faragher/Ellerth, employers continue to have liability for supervisory hostile environment harassment over and above that imposed under simple negligence standards. As explained by the EEOC:

> In some circumstances, however, unlawful harassment will occur and harm will result despite the exercise of requisite legal care by the employer and employee. . . . In these circumstances, the employer will be liable because the defense requires proof that it exercised reasonable legal care *and* that the employee unreasonably failed to avoid the harm. While a notice-based negligence standard would absolve the employer of liability, the standard set forth in *Ellerth* and *Faragher* does not. As the Court explained, vicarious liability sets a "more stringent standard" for the employer than the "minimum standard" of negligence theory. *While this result may seem harsh to a law abiding employer, it is consistent with liability standards under the anti-discrimination statutes which generally make employers responsible for the discriminatory acts of their supervisors.* If, for example, a supervisor rejects a candidate for promotion because of national origin-based bias, the employer will be liable regardless of whether the employee complained to higher management and regardless of whether higher management had any knowledge about the supervisor's motivation. *Harassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability, and that limitation must be construed narrowly.* The employer will be shielded from liability for harassment by a supervisor only if it proves that it exercised reasonable care in preventing and correcting the harassment *and* that the employee unreasonably failed to avoid all of the harm. If both parties exercise reasonable care, the defense will fail.

Appendix D to HEC Petition - EEOC ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS at 9 (emphasis added).

Petitioner's premise that Faragher/Ellerth eliminated an employer's strict liability for supervisory sexual harassment or transformed employer liability for harassment to a simple negligence standard is incorrect. The Commission has been asked to initiate rulemaking on the basis of inaccurate representations by Petitioner regarding the effect their requested amendments would have on Hawai'i discrimination law.

D. The Current Rules Achieve the Remedial Purposes of Hawai'i Law.

Petitioner asks the Commission to amend its administrative rules and states the reasons for its petition to be three unsupported premises: 1) That amendment of Hawai'i

law is necessary to deter harassment; 2) That amendment of Hawai'i law is necessary to "prevent employees from obtaining windfall relief in cases where they could have taken reasonable steps to avoid unlawful harassment"; and 3) That amendment of Hawai'i law is necessary "to encourage employers to promulgate effective harassment policies and to provide training that combats unlawful harassment in the workplace." [24]

1. The Current Rules Deter Harassment.

Petitioner asserts that amending the administrative rules as requested will deter workplace harassment. This assertion has not been and cannot be substantiated.[25] Academic studies of the effect of Faragher/Ellerth on the numbers and types of sexual harassment cases found that in the eight (8) years after Faragher/Ellerth, all available empirical evidence demonstrated that the number of harassment cases has not decreased[26] and that the federal courts' application of the affirmative defense undermined, rather than facilitated, the goals of deterrence and protecting employees from discriminatory harassment.[27] Further, the persistent dearth of empirical information or studies regarding the kinds of policies and complaint procedures that *actually* prevent harassment, demonstrates how little Faragher/Ellerth has motivated employers to end harassment.[28]

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[24] HEC Petition at 10-11.

[25] See, Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 198 (2004)(hereinafter "Lawton, *Operating in an Empirical Vacuum*").

[26] See, Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARVARD JOURNAL OF LAW & GENDER 1, 6 (Spring 2003)(hereinafter "Grossman, *The Culture of Compliance*")(noting that while the level of harassment has remained stagnant, the number of sexual harassment-related lawsuits and administrative filings have grown).

[27] See, David Sherwyn, et. al., *Don't Train Your Employees and Cancel your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265 (2001)(hereinafter "Sherwyn, *Don't Train Your Employees*")(analyzing the first seventy-two post Faragher/Ellerth opinions involving employers' summary judgment motions raising the affirmative defenses in response to charges of supervisory sexual harassment); Lawton, *Operating in an Empirical Vacuum* (analyzing 200 federal cases, decided between June 26, 1998, the date Faragher/Ellerth were decided, and June 30, 2003, in which the courts' decisions rested on the elements of the Faragher/Ellerth defense and evaluating how courts interpreted the two prongs of the defense).

[28] Lawton, *Operating in an Empirical Vacuum*, at 222 (noting there is no empirical evidence as to what makes a policy "effective" at preventing harassment). Further, academics note that the courts have

The Faragher/Ellerth affirmative defense has provided little, if any, additional incentive for employers to actually create work environments that are free from harassment, and where harassment has occurred, to create environments in which employees feel safe about using employer complaint procedures.

> A rule of vicarious liability encourages an employer, as no other regime does, to exercise the greatest care in screening prospective managers, and in training, supervising, and monitoring existing supervisors. As Judge Posner has explained: '*[t]he most efficient method of discouraging sexual harassment* may be creating incentives for the employer to police the conduct of its supervisory employees, and this *is done by making the employer liable.*'

Brief of Amicus Curiae Equal Rights Advocates et. al., Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) (No. 97-569), 1998 WL 145349 at 17 (hereafter "ERA Amicus Brief") (quoting Richard A. Posner, AN ECONOMIC ANALYSIS OF SEX DISCRIMINATION CASES, 56 U.Chi.L.Rev. 1311, 1332 (1989)) (emphasis added). Holding employers automatically liable for harassment by their supervisory personnel is a clear motivator for employers to end workplace harassment because it "increases the likelihood that the employer will provide adequate training for its supervisors, and then monitor its supervisory staff to ensure that harassment policies are followed."[29] Amending Hawai'i

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done little to advance the search for "effective" policies and procedures because federal court decisions have failed to make fact-intensive and nuanced analyses of employer's policies and procedures and they tend to ignore real factors known to contribute to workplace harassment, such as an individual's propensity to harass, the victim and harasser's placement in an employer's organizational culture, and the gender makeup of the workplace. See id. at 212-41 ("Notwithstanding the empirical evidence [that adoption of an anti-harassment policy and grievance procedures do not along significantly affect the frequency of harassment], the lower federal courts look no further than the employer's policy and procedure on paper when evaluating the employer's preventative efforts, often concluding, with little evidentiary support other than the words of the policy or the description of the grievance procedure, that the policy and procedure are 'reasonable', 'effective,' or 'designed to deter harassment."). See also, Grossman, *The Culture of Compliance*, at 27–50 (discussing the causes and cures of harassment); Sherwyn, *Don't Train Your Employees*, at 1290 (noting that, based on its survey and analysis of the first seventy-two post Faragher/Ellerth cases dealing with the affirmative defense, "the overwhelming majority of cases hold that an employer exercises reasonable care when it has a policy that is disseminated to all employees, and it provides employees with an opportunity to report the harassment to someone other than the harassing supervisor").

[29] State Department of Health Services v. Superior Court, 113 Cal.Rprt.2d 878, 888 (2001), *review granted and superseded by* 117 Cal.Rprt.2d 166 (2002), *rev'd by* 6 Cal.Rprt.3d 441 (2003)(under California law employers are strictly liable for sexual harassment by a supervisor).

law to eliminate employer's automatic liability for supervisor harassment will not deter harassment and will undermine the remedial purpose.

2. The Current Rules Compensate Victims of Discrimination.

The HEC Petition claims Hawai'i law must be amended to "prevent employees from obtaining windfall relief in cases where they could have taken reasonable steps to avoid unlawful harassment" (emphasis added).[30] When victims of harassment are awarded damages and other relief for the harm they experience due to the harassment, they are being compensated for *real* harm they have suffered.[31] Amending Hawai'i law to provide employers with a means to eliminate this liability would deny compensation to *real* victims of discrimination for the *real* harm they have suffered.[32] Such relief in no way constitutes a "windfall."

The clear public policy goal underlying Hawai'i law is the elimination of "the practice of discrimination because of race, color, religion, age, sex, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services." HRS § 368-1. HRS Chapter 368 and 378 are

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30 HEC Petition at 10.

31 Victims of harassment who do not experience a "tangible employment action" such as demotion or termination, nonetheless suffer real harm. Harassment inflicts psychological injury on its victim. "Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry. When asked whether the experience had any emotional or physical effect, 78 percent of Working Women United Institute sample answered affirmatively." ERA Amicus Brief, at 8 (quoting Catherine MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN 47 (1979)). Noting further that "over 90% of sexually harassed women suffer some debilitating stress reaction, including anxiety, depression, headaches, sleep disorders, gastrointestinal disorders, weight gain or loss, nausea, lowered self-esteem, and sexual dysfunction." Id. (quoting J.L. Vinciguerra, *The Present State of Sexual Harassment law: Perpetuating Post Traumatic Stress Disorder in Sexually Harassed Women*, 42 CLEV. ST. L. REV. 301, 315 (1994). See also, Dolores Santos v. Hawaiian Flower Exports, Inc and Masami "Sparky" Niimi, Docket No. 92-001 E-SH, Final Decision and Order (HCRC Jan. 25, 1993)(awarding $80,000.00 in compensatory damages to employee subjected to sexual harassment by supervisor).

32 In reality, allowing employers to entirely escape liability for the sexual harassment of employees by one of its supervisory personnel is providing a "windfall" to the employer because the employer is allowed to eliminate liability and entirely avoid paying damages for harm suffered by its employee. If Hawaii law were amended to entirely eliminate liability for supervisory harassment when victims of harassment do not complain under employer policies, victims of harassment are unfairly denied a declaration that the law has been violated and a remedy for the harm, where such remedy is appropriate. An employer who assumes the risk of doing business is far better able than its subordinate employee to absorb the losses caused by harassment, insure against such losses, or otherwise distribute such losses.

remedial statutes that are "designed to enforce civil rights protections and *remedy* the effects of discrimination [and] should be liberally construed in order to accomplish that purpose." Furukawa v. Honolulu Zoological Soc., 85 Hawai'i 7, 18, 936 P.2d 643, 653 (1997)(emphasis added)(citing Flores v. United Airlines, 70 Haw. 1, 12, 757 P.2d 641, 647 (1988).[33] Deterring discrimination and compensating victims for the harm they have suffered due to discrimination are equally valued objectives. Neither should be sacrificed to the other.

Imposing liability on employers for supervisory misconduct recognizes that supervisors are in a unique position of authority to extort sexual favors or to otherwise affect the work environment to which an employee is subjected.[34] Holding both the

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[33] A "remedial statute" was described by the *Furukawa* court as one that "provide[s] a remedy, or improves or facilitates remedies existing for the enforcement of rights and the redress of injuries." Flores v. United Airlines, 70 Haw. 1, 12, 757 P.2d 641, 647 (1988).

[34] In embracing automatic employer liability for supervisory harassment, a Massachusetts court stated:

> Although coworkers or even outsiders may also be capable of creating a sexually harassing work environment, *it is the authority conferred upon a supervisor by the employer that makes the supervisor particularly able to force subordinates to submit to sexual harassment.* ...
> [Mass. general law] prohibits discrimination by 'an employer, by himself or his agent.' Furthermore, [Mass. statute], provides that '[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof....' *It is clear that the Legislature intended that an employer be liable for discrimination committed by those on whom it confers authority.* ... The Legislature sought to remove discriminatory barriers to full participation in the workforce. Supervisors who create a sexually harassing work environment present a serious barrier to that goal. Harassment by a supervisor stigmatizes an employee, and appears to reflect an attitude of the employer that the employee is not considered equal to other employees. In addition, *harassment by a supervisor carries an implied threat that the supervisor will punish resistance through exercising supervisory powers,* which may range from discharge to assignment of work, particularly exacting scrutiny, or refusal to protect the employee from coworker harassment. *Quid pro quo harassment may be easier to identify as an abuse of the authority vested in a supervisor because of the effect on tangible job conditions, but it does not define the limit of a supervisor's authority.* Although coworkers or even outsiders may also be capable of creating a sexually harassing work environment, it is the authority conferred upon a supervisor by the employer that makes the supervisor particularly able to force subordinates to submit to sexual harassment. ... The [Massachusetts] commission has consistently found an employer liable for sexual harassment of subordinates committed by its supervisors [and] ... [w]e note that "an administrative interpretation of a statute is accorded deference particularly 'where, as here, an agency must interpret a legislative policy which is only broadly set out in the governing statute.' "...
> We do not think that the Legislature intended employers to be liable for their supervisors' discriminatory acts in exercising their supervisory powers *only after the employee complains to the employer.* "We are not insensitive to the fact that 'employees are

offending supervisor and the employer liable for the harm that is caused by supervisory harassment "is consistent with the Legislature's intent to provide effective remedies which will eliminate such discriminatory practices."[35]

The current regulations properly take into account the difficulty employees often have in filing complaints of harassment.[36]

> understandably reticent to complain or try to prove affronts of such a personal and debasing nature [as sexual harassment].' "... The shortcomings of a system requiring notice to the employer are particularly pronounced where it is the employee's supervisor who commits sexual harassment. *We see no reason why an employer should be liable for a supervisor who fails to remedy or report coworker harassment, but not for the supervisor's own harassment of subordinates.*

College-Town v. Massachusetts Comm'n Against Discrimination, 400 Mass. 56, 508 N.E.2d 587, 593 (Mass. 1987)(emphasis added, citations omitted). See also, VECO, Inc. v. Rosebrock, 970 P.2d 906, 914 (Alaska 1999)("even where the employer has issued a policy prohibiting sexual harassment, and where the employer has established procedures for the receipt of employee complaints, the employer will still have aided the supervisor in committing the harassment. ... Therefore, we hold that an employer is vicariously liable for the hostile work environment created by its supervisors regardless of whether management-level employees knew or should have known about the harassment, and regardless of whether the supervisors were acting within the scope of their employment.")

[35] See, Matthews v. Superior Court, 34 Cal.App.4th 598, 606 (Ca. 1995). Petitioner claims that the current administrative rules regarding employer liability for supervisor harassment and regarding complaint filing in co-worker harassment cases prevents employers from raising "avoidable consequences" in response to claims of harassment. This is not true. It is true that under Hawaii law the failure of the employee to report the harassment or to use the employer's preventative or corrective measures does not constitute an affirmative defense. However, evidence of an employee's failure to act would not necessarily be excluded from consideration because such evidence could be relevant to a host of other issues, such as credibility, mitigation of damages, and unwelcomeness.

Neither the Hawai'i Legislature, the Hawai'i courts, or the Commission, has stated whether the "avoidable consequences doctrine" would apply to the damages in a discrimination complaint filed under HRS Chapters 368 and 378. The current administrative rules do not theoretically preclude application of such a theory to reduce the damages awarded to a victim of harassment, and it is not sound to presume that in all cases involving an employer's exercise of reasonable care in preventing and correcting harassment and an employee's failure to take reasonable steps to report the harassment or to utilize the protections offered by the employer, that state and federal law would always produce a different end result. HAR §§ 12-46-109(c), 12-46-109(d) and 12-46-175(d) do prevent employers from raising an "avoidable consequence" doctrine to *entirely* avoid liability. However, there is nothing in the rules that either prevents or allows employers to assert an employee's purported failure to mitigate the harm suffered as a result of harassment in order to reduce the amount of damages awarded to that employee. See, e.g., State Department of Health Services v. Superior Court, 113 Cal.Rprt.2d 878, 888 (2001), *review granted and superseded by* 117 Cal.Rprt.2d 166 (2002), *rev'd by* 6 Cal.Rprt.3d 441 (2003); K.S. v. ABC Professional Corp., 330 N.J.Super. 288, 749 A.2d 425 (NJ 2000), Lehman v. Toys R US, Inc., 132 N.J. 587, 626 A.2d 445 (NJ 1993); Board of Directors, Green Hills Country Club v. Illinois Human Rights Comm'n, 162 Ill.App.3d 216 (Ill.App. Ct. 1987); In The Matter Of Jesse Mansker, Ill. Human Rights Commission Charge No. 1999SF0356, ALS No. S11202, 2004 WL 3372598 (Ill. Hum.Rts.Com. 2004). Consideration of an employee's mitigation of damages would be raised on a case by case basis and does not require the radical step of amending fifteen years of settled Hawai'i law or eliminating employer liability for supervisory harassment.

> As the courts have conceded when recounting victims' narratives, there are often circumstances where a victim's fear of retaliation or stigma or resistance keeps her from reporting the harassment. Countless narratives telling of the alleged incidents of harassment in Title VII suits bears this out. In one case, a plaintiff claimed she "stopped reporting the harassment to [her supervisor] because he had told her not to say anything and threatened that she would lose her job if she did." In another ... a male plaintiff sued his corporation for alleged harassment by his supervisor, maintaining he 'never reported any sexual harassment to anyone because he was ashamed and afraid' ...

Kerri Lynn Bauchner, *From Pig in a parlor to boar in a boardroom: Why Ellerth Isn't Working and How Other Ideological Models Can Help Reconceptualize the law of sexual harassment*, 8 COLUM.J.GENDER & L 303, 316 (1999).[37]

Unlike federal law, where the filing period for harassment complaints is no more then 300 days, the Hawai'i Legislature has affirmatively recognized that victims of sexual harassment often take longer periods of time to complain because they are "often so traumatized by the occurrence [of harassment] that they fail to file with the commission within 180 days."[38] Unlike Title VII, Hawai'i law specifically recognizes the difficulty of

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[36] "An employee who has been sexually harassed on the job by a co-worker should inform the employer, its agent, or supervisory employee of the harassment; however, an employee's failure to give such notice may not be an affirmative defense." HAR § 12-46-109(d).

[37] "Most harassed employees do not even complain. Fifty percent of women respond to harassment by doing and saying nothing." F. Klein & M. Rowe, Estimating the Cost of Sexual Harassment to the Fortune 500 Service and Manufacturing Firms, Testimony on H.R. 1, before House of Representative Committee on Education & Labor, 102nd Cong., 1st Sess. 169, 209 (1991). Only 10% to 15% of women, a review of ten studies revealed, either respond assertively to or reported their harasser. J.E. Gruber & M.D. Smith, Women's Responses to Sexual Harassment: A Multivariate Analysis, Basic & Applied Social Psychology, at 544-545 (1995). The barriers keeping women from complaining about harassment are especially daunting when a supervisor is the source. 'Real victims rarely tell the harasser to stop. They are often inhibited or constrained from doing so by the situation (e.g., their supervisor is the harasser), or by their upbringing.' B.A. Gutek, Response to Sexual Harassment in Gender Issues in Contemporary Society, at 197, 205 (1993). ... If company policy requires a victim to go to her supervisor first, she may feel she has little recourse and will receive little support. Promises of confidentiality or anonymity are impossible for employers to keep. The accused ultimately will be informed of the accusation and given a chance to present his story, even confront his accuser. Victims understand that the implications for their employment are gravest when a person with power in the organization is involved." ERA Amicus Brief, at 12.n7. See also, Sherwyn, *Don't Train Your Employees*; Grossman, *The Culture of Compliance*; Lawton, *Operating in an Empirical Vacuum*.

[38] See, 1992 Haw. Sess. L., Act 275 (regarding enactment of HRS § 378-3(10), providing victims of sexual harassment with a 2-year statute of limitation for filing employment discrimination complaints under HRS § 378); See also, Furukawa v. Honolulu Zoological Soc. , 85 Hawai'i 7, 18-19, 936 P.2d 643, 653 (1997).

filing harassment complaints and allows victims of sexual harassment an extended filing period of as long as two years for sexual harassment complaints. The current regulations help to effectuate Hawai'i's longer statute of limitations with respect to the filing of sexual harassment complaints. Petitioner's request that the Commission now engage in rulemaking to adopt an affirmative defense that would allow employers to *entirely* avoid liability if a victim of supervisory harassment fails to complain or delays filing a complaint with the employer is inconsistent with the Legislature's express adoption of an extended filing period for sexual harassment.

Unfortunately, too often the federal courts' application of the Faragher/Ellerth defense has resulted in the entire dismissal of cases involving reprehensible harm to a vulnerable victim on the narrow view that the harassment victim's failure to quickly or correctly use employer's internal complaint procedures[39] precludes a claim as a matter of law. [40] Examples of such cases include:

- The sexual harassment claims of a custodial employee who was repeatedly sexually assaulted by two supervisors over a five-year period. As a recent immigrant from Haiti, the employee did not read, and she spoke and understood very little English. Only after a chance meeting with her employer's human resources officer was she able to complain about the abuse at the hands of her supervisors. Once the employer had notice of the harassment, an investigation was conducted and the supervisors were demoted and relocated. Although the employee had not received the employer's anti-harassment policy, was very poor, and was physically overwhelmed by her supervisors when she was sexually assaulted, the federal court found – as a matter of law – that her failure to complain sooner was "unreasonable" and that the employer was "reasonable" because it conducted an investigation and arguably took appropriate corrective action, and granted the employer's motion to dismiss the entire case. Samedi v. Miami-Dade County, et. al., 206 F.Supp.2d 1213 (S.D. Fla. 2002).[41]

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[39] See also e.g., Shaw v. Autozone, Inc., 180 F.3d 806, 811 (7th Cir. 1999)(noting that company's distribution of an appropriate policy often satisfies the first prong of the affirmative defense); Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1297-99 (11th Cir. 2000)(finding employer exercised reasonable care to prevent harassment because it had created and distributed a policy and complaint procedures that were not inherently defective).

[40] See, Sherwyn, *Don't Train Your Employees*, at 1297 n.144; Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 700-04 (2000)(referring to Marsicano v. American Society of Safety Engineers, No. 97-C7819, 1998 WL 603128 (N.D. Ill. Sept. 4, 1998)).

[41] In Samedi, the court found the employer satisfied the first prong of the defense by merely posting the policy on a bulletin board and that it was irrelevant that the plaintiff never saw the policy or that the policy was not in a language she could understand. Id. at 1220. See also, Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529 (Feb. 2006)(providing cases illustrating

- A sexual harassment claim involving a supervisor who had prior complaints by two other employees which were investigated and resulted in employer's attempted termination of the supervisor. Shortly after the supervisor's successful appeal of his termination he began sexually harassing the plaintiff, telling her "she needed to put some Band-Aids over her nipples," he could "eat" her, and he needed to "relieve himself" because his wife was making him sleep on the couch. The supervisor physically assaulted, attempted to kiss, and sexually assaulted the employee. The employee complained to her superiors when the supervisor became violent on the job. The trial court discounted the employee's reasons for waiting three (3) months to complain (she "thought he would back off" and did not believe that complaining would be effective because two other female employees had complained about his harassment, and yet he was reinstated), found that the woman acted "unreasonably" in waiting to report the harassment, and dismissed the employee's claims. Dedner v. State of Oklahoma, 42 F. Supp.2d 1254 (E.D. OK 1999).

- An Illinois federal court held a victim's two-week delay in reporting supervisor harassment was "unreasonable" where the victim failed to mention the harassment in response to high level manager asking her how she was "settling into the job." Later that day, the woman was again sexually harassed by her supervisor. The next day, the employee reported the harassment (and refused to accept the employer's offer of a transfer that entailed limited contact with the supervisor). The court held that the woman's actions were "unreasonable" because she had "unreasonably failed to take advantage of a corrective, and, more importantly, preventive opportunity provided by her employer." Marsicano v. American Society of Safety Engineers, No. 97-C7819, 1998 WL 603128 (N.D. Ill. Sept. 4, 1998).

In each of these federal cases, although the employee had provided evidence of the basest kinds of supervisory sexual harassment, the federal court viewed the Faragher/Ellerth defense as providing a complete escape valve from all employer liability for the harassment.[42]

The Faragher/Ellerth affirmative defense is wrong for Hawai'i because it denies compensation to victims of harassment and it unfairly shifts the burden of preventing

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where courts found, as a matter of law, that the plaintiff acted "unreasonably" because she/he delayed reporting or failed to report the harassment).

[42] See, Lawton, *Operating in an Empirical Vacuum*, at 213 (noting that "it is not uncommon for an employer to concede or a court to assume that the workplace conduct of which the plaintiff complains was severe or pervasive. Employers and courts do so in order to dispose of the plaintiff's case on the basis of the affirmative defense on a motion for summary judgment or judgment as a matter of law"); Id. at 198 n.7 (noting that while the Supreme Court intended the affirmative defense to affect liability or damages, the lower courts have interpreted the defense so "that it always operates to eliminate liability")(citing Grossman, *The First Bite is Free*, at 676-77).

harassment from employers to employee-victims of harassment. The current rules correctly state Hawai'i law regarding the non-existence of an affirmative defense related to an employee's failure to file an internal complaint of harassment with their employer and better serves the state's interest in deterring unlawful employment discrimination and compensating the victims of such unlawful employment discrimination.

3. The Current Rules Do Not Prevent Employers From Taking Actions Designed to Prevent and Eliminate Harassment.

Nothing in the present rule prevents employers from establishing effective anti-harassment policies and training programs, monitoring supervisory conduct, or taking immediate corrective action when harassment occurs. In fact, the current regulations encourage all three.[43] Petitioner concedes that employer policies and training have a deterrent effect upon harassment and harassment lawsuits. What Petitioner is apparently unwilling to concede is that vicarious liability motivates employers to do more than just putting preventative policies and practices in place, but also encourages them to do more, such as monitoring supervisory conduct and workplace culture.[44] Petitioner's contention that employers must have an affirmative defense before they are motivated to enact anti-harassment policies and train and monitor their supervisors is counterintuitive and unsupported, and, therefore, does not justify its proposed rule amendment.

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[43] "Prevention is the best tool for the elimination of sexual harassment. Employers should affirmatively raise the subject, express strong disapproval, develop appropriate sanctions, inform employees of their right to raise and how to raise the issue of sexual harassment, and take any other steps necessary to prevent sexual harassment from occurring." HAR § 12-24-109(g). See, Grossman, *The Culture of Compliance*, at 27-50 (exploring the efficacy of various preventative and corrective measures to combat workplace harassment).

[44] ERA Amicus Brief, at 19. Noting that vicarious liability creates incentives to put sexual harassment policies and training programs in the workplace:

> 54% of Fortune 500 employers admitted that fears of legal exposure prompted them to establish company policies against sexual harassment. R. Sandroff, Working Woman at 70. Prevention programs, including well-communicated policies and effective training programs, are the best means of reducing sexual harassment in the workplace. ... Companies implementing sexual harassment training programs have reduced the number of claims that developed into lawsuits. See Sarah Glazer, Crackdown on Sexual Harassment, 6 CQ Researcher 625, 633-34 (July 19, 1996(of 456 mid-size and large companies, 8% of companies with training programs were sued, as opposed to 12% of those without such programs).

Id. at 19-20 (some citations omitted).

III. CONCLUSION

The Commission should deny further consideration of the HEC Petition because it fails to provide sufficient reasons to justify rulemaking. The initial premise upon which the HEC Petition is based is incorrect and the analysis of the anticipated effect or impact of the relief being requested is incomplete. In addition, the Petitioner has not shown the relief requested is necessary or would further the interests of the Commission.

The current rules do not prevent employers from doing what is being requested by the HEC Petition. Petitioner asks the Commission to revisit an area of law that has been settled for some time and the Hawai'i Supreme Court has not disturbed it. At its core, the HEC Petition asks the Commission to provide an affirmative defense for employers who take steps to avoid harassment in the workplace, but would absolve employers of the responsibility they have to maintain an environment free of unlawful harassment and put that responsibility on employees who are not in the same position of power. Such a result is contrary to Commission's own decisions and ruling of the Hawai'i Supreme Court.

For the reasons stated above, the Executive Director recommends that the HEC Petition be denied.